No. 85-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE SUPPORTING PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in this Court's rules. The AFL-CIO, a federation of 94 international and national labor organizations representing approximately 13 million working men and women, has a plain interest in this case, which will likely refine the test for determining when conduct by employers and unions violates Title VII of the Civil Rights Act of 1964's proscription of religious discrimination in the workplace.

ARGUMENT

Introduction And Summary

Respondent, a public-school teacher employed by petitioner Board of Education, belongs to a religion whose tenets dictate that he absent himself from work on certain religious holidays. Depending on the calendar, this obligation may require his absence on as many as six school days in the course of a school year.

The Board of Education, pursuant to a collective bargaining agreement, provides all teachers the right to take up to three days' leave *with pay* for religious observance. Additionally, in response to respondent's stated need for additional absences for religious observance, the Board has authorized him to take leave *without pay* for the additional days he needs. By this latter accommodation, the Board has removed entirely the dilemma that has confronted the religious observer in the usual run of cases, and that was the focus of this Court's opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), *viz*, whether a religious observer unable to conform to the employer's customary work requirements may for that reason be *discharged or otherwise denied employment.*

This case, instead, presents the question whether an employer who accommodates religious observers by allowing the observers to be absent when their religion requires has an *additional* duty to attempt to mitigate the adverse economic consequence to those who avail themselves of that opportunity and thereby miss certain days of work. Indeed, since the collective bargaining agreement here provides religious observers their pay for the first three days of religious absence, the precise question in this case is whether Title VII of the Civil Rights Act of 1964, as amended, requires the employer to provide compensation for the fourth through sixth days of such absence as well. But the same legal issue would be posed if an employer

authorized absence for religious observance without agreeing to pay for any of the days of absence.

The court below held that this question, like the question posed in *Hardison*, is governed by the "reasonable accommodation without undue hardship" standard of § 701(j) of Title VII.[1] That court held that if this employer, without "undue hardship," could have found a way to provide respondent some or all of the pay he lost on his fourth, fifth and sixth days of religious absence, Title VII obliged the employer to do so. The court below remanded the case to the district court for a determination pursuant to that standard.

It is our submission that the court below erred as a matter of law in holding that the "reasonable accommodation" standard applies to this situation. It is clear from the evolution of Title VII and from the sponsors' explanation of their purpose that the lone concern actuating passage of § 701(j) was a desire to protect employees in appropriate circumstances from *losing their jobs* because the employees were unable for religious reasons to conform to customary work requirements. Congress' con-

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[1] Title VII's basic prohibition against religious discrimination, enacted in 1964, appears in Section 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1):

> (a) It shall be an unlawful emplyoment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

In 1972, Congress amplified this prohibition by enacting Section 701(j), 42 U.S.C. § 2000e(j), which provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's observance or practice without undue hardship on the conduct of the employer's business.

cern thus was that the few days of collision between religious needs and work requirements not foreclose religious observers from equal employment opportunity on all the other days during which the observers are ready and able to work. Congress' focus was *not* on subsidizing religious observance, but on assuring the observer equal treatment on the normal working days when his status is indistinguishable from that of other employees. By contrast, the court below would apply the "reasonable accommodation" standard to provide special protection to the religious observer *in his observance*; the court below would impose an obligation on the employer to attempt to accommodate the observer's desire to be paid for the days the observer is *not* working because of his religion.

The values that would be encompassed by a decision to require such subsidization of religious observance are qualitatively different from the values encompassed by a decision to assure religious observers an equal opportunity to compete on the days they are *not* observing their religion, and it would be wrong to attribute the former values to Congress in the absence of any evidence that Congress embraced them. And, because congressional imposition upon employers of an affirmative obligation to subsidize religious observance would pose more substantial Establishment Clause problems than does the obligation that Congress consciously imposed, there is all the more reason to steer clear of an interpretation that would impose that additional obligation absent evidence that Congress so intended.

Of course, if we are right that Congress imposed no *affirmative* obligation to accommodate religious observers' desires to avoid the loss of pay resulting from their absence from work, employers remain under the *negative* duty not to discriminate with respect to compensation on the basis of religion. Where an employer

has chosen to provide *paid* leave for designated purposes, the question may be posed whether that employer has discriminated against religious observance in selecting the kinds of absences for which such compensation is provided. The record of this case, however, presents no basis for a claim of such discrimination: the collective bargaining agreement here, in its provision on compensation for absence, has treated absence on religious grounds more favorably than all secular grounds for absence except illness and death in the immediate family.

I. Title VII Does Not Require Employers To Attempt To Accomodate Religious Observers' Desires To Be Compensated For The Pay They Lose When Absent From Work For Religious Reasons

The question presented here is whether an employer who accommodates religious observance by allowing an employee time off for such observance has an additional duty to attempt to mitigate the adverse economic consequence to the religious observer of absenting himself from work. *See* pp. 2-3 *supra*. For the reasons that follow, we do not believe that Congress can or should be understood to have imposed this additional duty.

The legislative history of § 701(j) reflects that the only concern prompting Congress to enact the "reasonable accommodation" obligation was to assure that employees would not be *denied employment altogether* because unable for religious reasons to meet particular employer work requirements, in those circumstances where the employer could without undue hardship reasonably adjust its work requirements to eliminate the barrier.[2]

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[2] We do not discuss the separate question of whether the employer here was required to permit respondent time off for his religious observance. Even this is doubtful; doing so required the employer to employ a substitute teacher, with a resulting adverse effect on the quality of education provided the students, and *Hardison* strongly suggests that such an effect would constitute an "undue hardship." *See* 432 U.S. at 84 ("lost efficiency" constitutes undue

(1) As originally enacted in 1964, Title VII contained a prohibition on religious discrimination without the elaboration now provided by § 701(j). As this Court recounted in *Hardison*, that prohibition "soon raised the question of whether it was impermissible under § 703 (a)(1) *to discharge or refuse to hire* a person who for religious reasons refused to work during the employer's normal workweek." 432 U.S. at 72 (emphasis added).

In 1966, the Equal Employment Opportunity Commission promulgated a guideline to "deal[] with *this problem*," *id.*; that guideline became the progenitor of § 701 (j). The guideline began by stating the context that had led the Commission to develop its "reasonable accommodation" standard:

> Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion *to discharge or to refuse to hire* a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year. [29 CFR § 1605.1(a)(1) (1967), emphasis added.]

The EEOC concluded that § 703(a)(1) requires employers to reasonably accommodate religious needs "where such accommodation can be made without serious inconvenience to the business," 29 CFR § 1605.1(a)(2) (1967), and then went on to suggest how employers might comply with that standard. The very first suggestion was the following:

> *An employer may permit absences from work on religious holidays, with or without pay,* but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another. [29 CFR § 1605.1 (b)(1) (1967), emphasis added.]

hardship). If the employer were not required to provide any time off for religious observance, it would be difficult to conclude that, by reason of having chosen to permit such time off, the employer becomes obligated to attempt to accommodate respondent's desire to be paid for this time.

In 1967, the EEOC amended this guideline. As in the 1966 guideline, the 1967 version began by reciting that the guideline was in response to complaints "rais[ing] the question whether it is discrimination on account of religion *to discharge or refuse to hire* employees" who are unwilling to work on days of religious observance. 29 CFR § 1605.1(a)(1968) (emphasis added). The 1967 guideline substituted the phrase "without undue hardship" for "without serious inconvenience" and specified that the employer has the burden of proving undue hardship. 29 C.F.R. § 1605.1(b), (c) (1978). The portion of the 1967 guideline allocating the burden of proof stated:

> Because of *the particularly sensitive nature of discharging or refusing to hire* an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. [29 CFR § 1605.1(c) (1968) (emphasis added).]

Unlike the 1966 guideline, the 1967 version no longer contained suggestions as to how employers might comply, and thus the express authorization to permit absences "with or without pay" no longer appeared. But it is evident from the passages quoted above that the EEOC's focus remained solely on insulating employees from job loss, and not on insulating employees against the salary loss resulting from absence for religious observance.

(2) Whether the EEOC's guidelines, in construing the prohibition against discrimination in § 703(a)(1) to impose an affirmative duty of reasonable accommodation, correctly discerned the intent of the 1964 Congress was

a much-mooted question in the courts. In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970)—a discharge case arising squarely within the ambit of the EEOC's guideline—the Sixth Circuit, in the course of an opinion upholding the discharge as lawful, expressed doubt that § 703(a)(1) created a duty of reasonable accommodation. 429 F.2d at 331 n.1. That doubt was not erased when this Court affirmed by an equally divided Court. 402 U.S. 689 (1971).

It was in this context that Senator Randolph, in 1972, proposed the amendment that became § 701(j), explaining that its purpose is to "resolve by legislation" the "uncertainty" existing in the courts. 118 Cong. Rec. 706 (1972). The text of Senator Randolph's amendment tracked the EEOC guidelines. And, like the EEOC guidelines and court decisions to which he referred in presenting his amendment,[3] Senator Randolph's focus was exclusively upon insulating religious observers from job loss owing to inability to comply with employers' customary work requirements. His lone explanation of the need for his amendment was as follows:

> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers *to hire or continue in employment* employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations

[3] Senator Randolph placed in the Congressional Record "the cases and regulations which are applicable to this issue". 118 Cong. Rec. 706. He there included the 1966 and 1967 EEOC guidelines, the Sixth Circuit's opinion in *Dewey* and this Court's affirmance, and the opinion in *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971) [later *rev'd*, 464 F.2d 1113 (5th Cir. 1972)]. *Riley*, like *Dewey*, involved a discharge for failure to conform to the employer's customary work requirements.

> *because of the situation to which I have just directed attention.* [118 Cong. Rec. 705 (1972) (emphasis added).]

In the brief colloquy over the amendment, the only subject discussed was the extent of the accommodation in work schedules that could be required of employers consistent with the "undue hardship" standard, Senator Williams declaring "the amendment would permit the employer not to hire a person" if accommodation would impose undue hardship. 118 Cong. Rec. 706.

In sum, the legislative history reflects that the sole concern actuating Congress was that religious observers could be needlessly foreclosed from employment opportunities *altogether* simply because their religious convictions precluded their meeting the employer's customary work requirements on *some* occasions. Congress therefore placed an affirmative obligation on employers to adjust work requirements, where that could be done without undue hardship, as a means of enabling religious observers to keep their jobs without having to surrender their religious convictions. But there is nothing in the legislative history to suggest that Congress intended in addition to impose an affirmative obligation on employers to attempt to eliminate, or mitigate, the economic loss incurred by religious observers who forego work (and the attendant wages) on particular days in observance of their religious beliefs.[4]

[4] Of course, while the congressional focus was on discharges and refusals to hire—those being the consequences religious observers were actually experiencing in the workplace because of their inability to conform to normal work schedules—the congressional concern would be equally applicable were an employer to penalize the need for religious absence in some lesser fashion, *e.g.* by visiting a disciplinary suspension encompassing a period in which the observer was available for work. The distinction is between hardships needlessly inflicted on religious observers when the observers are ready and able to work (the focus of Congress' attention) and the loss of income attributable to absence from work for religious reasons.

(3) For Congress to have imposed the latter obligation would have required an entirely different complex of value judgments than those actuating the former. The values Congress sought to accommodate by enacting § 701(j) were aptly stated by Justice Marshall, dissenting in *Hardison*: "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their jobs". 432 U.S. at 87. *See also*, 118 Cong. Rec. 705-706 (remarks of Sen. Randolph). The interest Congress sought to promote thus was *not* insulation from the economic consequence of choosing to worship rather than work on a given day, but insulation from the loss of employment on *other* days when the employee would be ready and able to work. Protecting that interest was viewed as furthering the general anti-discrimination purpose of Title VII, for doing so enables the religious observer to be treated equally with all other persons on the days that the observer and non-observer are equally available for work.

By contrast, imposing an affirmative obligation on employers to attempt to find ways to recompense the religious observer for the wages he has foregone by opting for worship in lieu of available work is to place the weight of the government behind the subsidization of religious practice. Assuming *arguendo* that the Constitution would *permit* Congress to do this, but see pp. 10-11, *infra*, there is nothing in the legislative history of § 701(j) to suggest that Congress has *chosen* to do so, and a congressional decision to impose such an unusual obligation upon employers should not lightly be inferred.

(4) We have shown thus far that traditional modes of ascertaining legislative intent would lead to the conclusion that Congress did not intend results so foreign to the concern that actuated the passage of § 701(j) as that reached by the court below. That conclusion is

reinforced by the recognition that § 701(j), as construed by the court below, would be far more vulnerable to challenge under the Establishment Clause than the provision that Congress consciously adopted.

While this Court has not finally passed on the constitutional validity of § 701(j),[5] it has been widely assumed that Congress has not transgressed the Establishment Clause by requiring employers, short of undue hardship, reasonably to accommodate work requirements in order that religious observers not be foreclosed altogether from employment.[6] That assumption has been predicated on the proposition that Congress was not acting to facilitate religious practice, but merely to shield those with religious needs from foreclosure from the workplace on the occasions when the religious observers are ready and able to work. On this understanding of § 701(j), the focus of congressional concern is not on the days of religious worship but on the *other* working days when such observers are indistinguishable from all other employees or job applicants. Accordingly, any preference accorded the religious observer is merely an incidental effect of providing the observer the opportunity to compete equally with all other employees or job applicants.

The construction of § 701(j) by the court below, in contrast, would have it that Congress focused on ways to provide employees compensation for worshipping rather than working. Under either form of the compelled accommodation envisioned by the court below—furnishing the religious observer paid leave for his absence, or providing him other work on other days by which he can make up

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[5] *See Hardison*, 432 U.S. at 70 & n.4; *id.* at 89 (Marshall, J., dissenting); *Thornton v. Caldor, Inc.*, —— U.S. ——, 105 S. Ct. 2914, 2919 (1985) (O'Connor, J., concurring).

[6] *See, e.g., Hardison*, 432 U.S. at 90-91, n.4 (Marshall, J., dissenting); *Thornton v. Calder*, 105 S. Ct. 2919 (O'Connor, J., concurring); and court of appeals decisions cited in the opinion of the court below, 757 F.2d at 487, n.11.

the lost pay[7]—Congress would be requiring employers to treat absence for religious purposes more favorably than those employers treat absences for legitimate secular necessities. And that preference would not be the incidental effect of attempting to preserve the religious observer's ability to compete equally with non-observers on *other* working days; it would, rather, reflect a congressional decision that religious absence is more deserving of compensation than absence necessitated by secular considerations.

On the view of the statute taken by the court below, the secular purpose ("antidiscrimination") that has been assumed to explain § 701(j) would be replaced by the purpose of fostering religion. *Cf. Thornton v. Caldor, supra.*[8] In the absence of any evidence that Congress was actuated by that purpose, or intended § 701(j) to have the reach prescribed by the court below, it would be plainly inappropriate to construe § 701(j) in a manner that would pose serious constitutional questions. For there is lacking here "the affirmative intention of Congress clearly expressed" that is the prerequisite for concluding that Congress intended to tread so close to the impermissible line. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-501, 506-507 (1979).

II. Petitioners' Paid Leave Program Does Not Discriminate On The Basis Of Religion

While Congress did not intend by enacting § 701(j) to impose an *affirmative* obligation on employers to ac-

[7] In this case, as the teacher is already obligated to teach on all teaching days, the other work of necessity would be non-teaching work that would otherwise have been performed by someone else.

[8] Indeed, the constitutional question would be indistinguishable from that which would be posed were Congress to enact a statute providing that religious worshippers would be compensated from public funds for any wages lost by reason of voluntary absence from work for religious observance. For what Congress cannot do directly under the Establishment Clause, the Legislature cannot require employers to do.

commodate religious observers' desires to be compensated for pay lost on days the observers worship rather than work, Congress in § 703(a)(1) did impose a *negative* duty on employers not to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . religion . . ."

(1) Employers who elect to provide paid leave for some purposes but not others may violate this duty if their choices constitute discrimination on the basis of religion. To take the simplest case, envisioned by the EEOC's 1966 guideline quoted *supra* at pp. 6-7, an employer who provides paid leave for religious observance to adherents of some religions but not others *would* violate Title VII.

(2) A more difficult question is whether an employer discriminates in violation of § 703(a)(1) by differentiating in its paid leave policies between absence for secular purposes and absence for religious purposes. It seems evident that an employer who authorizes its employees to take three days of paid leave each year "for any purpose whatever, so long as the leave time is not used for religious observance" *ought* to be held to be in violation of § 703(a)(1). Such employer conduct constitutes religious discrimination in the classic sense: having exhibited by its policy that it cares about neither the religious observer's absence nor the cost of paying for that absence, the employer is simply providing lesser benefits to those who, during their free time, choose to engage in religious observance than the employer provides to all its other employees.

A different answer is called for, however, when the employer does *not* provide "general purpose" paid leave which an employee can use for any purpose the employee chooses, but instead provides "special purpose" paid leave to be used only when a specified reason obtains. With respect to those cases, we agree with the court below, *see* 757 F.2d at 485, that an employer is entitled to provide paid leave for specified secular purposes (*e.g.*, illness,

death in the family, weddings, etc.) without thereby becoming obligated to provide paid leave for religious purposes as well. Such an employer is *not* singling out religious observers for disfavored treatment as compared to other employees. Indeed, were the rule otherwise—were an employer who provides "special purpose" paid leave for particular purposes required to provide paid religious leave as well—Title VII would have the effect of favoring religious interests over those secular interests for which the employer does not provide paid leave, a result at odds with the statutory purposes. *Hardison*, 432 U.S. at 84-85.

To be sure, there may be cases where an employer's catalogue of compensable secular needs becomes so expansive that it approaches a "general purpose" paid leave policy that effectively excludes only religious observance. Those cases can be dealt with if and when they arise; it is sufficient that the instant case plainly is not in that category.

(3) The paid leave program of this employer is contained in a collective bargaining agreement and is set out at JA 94-95.[9] Employees are authorized up to 18 days paid leave per year "for personal illness and/or illness in the immediate family," and may accumulate unused sick leave from year to year up to a maximum of 180 days. The cumulated sick leave may also be used for other designated purposes in designated amounts, for example, up to five days for death in the immediate family, one day each for wedding or graduation attendance, one day for serving as an official delegate to a veterans or teachers organization, etc. In addition, employees are allowed up to three days of paid leave for "mandated religious observance," and, unlike all other categories, these days

[9] The indicated pages contain the paid leave provision in the 1978-1982 contract. The identical provision appears in the 1982-85 contract. JA 98-100. The provisions in contracts prior to 1978 are at JA 71-93.

are in addition to (and not charged to) the accumulated sick leave. Finally, three of the accumulated sick leave days are available for "necessary personal business."

It is the last of these items that stirred the interest of the court below, which conjectured that these "necessary personal business" days might in practice be "general purpose" leave days from which religious observance is arbitrarily excluded. 757 F.2d at 485. The record, however, does not leave room for that conjecture.

On its face, the "necessary personal business" category is, as its title suggests, a limited-use provision, available only for personal "business" that is "necessary." The collective bargaining agreement expressly states that leave in this category may *not* be claimed for "[a]ttendance or participation in a sporting or recreational event," for "[t]ravel associated with any provision of annual leave," or for other enumerated purposes, and further states that the enumerated prohibitions are not the only "limitations" on its availability. Additionally, the collective bargaining agreement states that leave in this category may not be claimed for any purpose for which leave is elsewhere specifically authorized (including religious observance), reflecting that the employer intended to limit its monetary exposure for each paid leave category to the number of days specified for that category. Finally, leave in this category is available only when the teacher is unable, despite "all reasonable efforts," to "plan and conduct personal business so that it does not conflict with assigned professional business."

The school superintendent testified without contradiction that the "necessary personal business" provision is monitored to assure that teachers receive paid leave only for the uses authorized, and that requests for such leave that do not fall within the ambit of the authorized uses are denied. JA 51-54, 61, 64-65, 145-146. That the "necessary personal business" provision is not in practice a

"general purpose" provision is demonstrated by the fact that in the school year preceding the trial only two of the 150 teachers in the school system had used all three days (JA 60) and most teachers had not used even one (P. Ex. 18).[10]

Plainly, the employer has not discriminated against religious observance in its paid leave policy. Only two uses are treated more favorably than religious observance: illness (18 days up to a cumulative total of 180 days) and death in the immediate family (5 days). The three-paid-day period for religious observance is as large as the days of pay allowed for any other use (indeed larger than most), and religious leaves are treated more favorably than all others in that they are not charged to accumulated sick leave. That the employer allows three days for other "necessary personal business," and does not allow those days to be used for *any* of the categories that are separately provided for, reflects no discrimination against religious observance, but merely an effort on the employer's part to contain its costs by limiting its monetary exposure for any particular use.[11]

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[10] The collective bargaining agreement specifies that the first day of leave for "necessary personal business" will be "[g]ranted at the discretion of the [teacher]," while the second and third days must be "request[ed]" and "approv[ed]." This does not mean that the first day is a "general purpose" day that teachers may use at their whim; it means rather, as the superintendent testified, that teachers are trusted (as they are instructed) to use that day only for the authorized purposes (JA 64-65). The school board will dock a teacher who uses that day for an "unauthorized purpose" (JA 65). In practice, most teachers do not claim *any* days of leave for "necessary personal business" (P. Ex. 18).

[11] Accumulated leave that has not been used is forfeited when the employee's employment ends (JA 146). Additionally, leave cannot cumulate beyond 180 days, so that employees already at the maximum forfeit unused leave each year (JA 149). In consequence, the employer has a direct economic interest in limiting the uses and monitoring compliance therewith.

To require this employer to make the three "necessary personal business" days available for religious observance would not only increase its costs in a manner that the employer expressly sought to avoid, it would provide a preference for the religious over the secular that is contrary to the overall purpose of Title VII described in *Hardison*, 432 U.S. at 84-85. Employees are not permitted to enlarge the paid leave for specified secular uses by rseorting to the "necessary personal business" provision, and Title VII's prohibition of discrimination on the basis of religion surely does not require that religious observance be afforded a privilege that is denied to all secular uses.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed.

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